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Supreme Court of the United States

OCTOBER TERM, 1964

No. 350

In the Matter of the Application of

ISIDORE BALABAN, PHYLLIS BALABAN, ARTHUR GOTTLIEB and LENORE GOTTLIEB,

Petitioners,

for an order under Article 78 of the Civil Practice Act

—against—

MAX J. RUBIN, JAMES B. DONOVAN, CLARENCE SENIOR, JOSEPH G. BARKAN, JOHN F. HENNESSY, MRS. MORRIS SHAPIRO, LLOYD K. GARRISON, MORRIS IUSHEWITZ, and AARON BROWN, constituting the Board of Education of the City of New York; CALVIN E. GROSS, Superintendent of Schools; BERNARD E. DONOVAN, Executive Deputy Superintendent of Schools; and FRANCIS A. TURNER, Assistant Superintendent of Schools,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement

Petitioners, Isidore Balaban, Phyllis Balaban, Arthur Gottlieb and Lenore Gottlieb, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on May 7, 1964, which affirmed a decision of the Supreme Court of New York, Appellate Division, Second Department, entered on March 10, 1964, which reversed a judgment at Special Term,

Supreme Court of New York, Kings County, entered on September 12, 1963, which had set aside as unlawful because based on race and color a determination by respondents that petitioners' children and 49 other children similarly situated should attend a certain newly constructed junior high school.

Opinions Below

The opinion of the Supreme Court of New York, Kings County, Special Term (Baker, *J.*) (R. 98), is reported at 40 Misc. 2d 249, 242 N. Y. S. 2d 973. The opinions of the Supreme Court of New York, Appellate Division, Second Department (Beldock, *P.J.*) (R. 107) are reported at 20 A. D. 2d 438, 248 N. Y. S. 2d 574. The opinions of the Court of Appeals of New York (Desmond, *C.J.*; Van Voorhis, *J.*, dissenting) are reported at 14 N. Y. 2d 193, 250 N. Y. S. 2d 281, 199 N. E. 2d 375, and are annexed as Appendix B (4a-13a). The judgment of the Court of Appeals is annexed as Appendix A (1a-3a).

Jurisdiction

The opinions and judgment of the Court of Appeals of New York were entered on May 7, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Question Presented

Whether the deliberate use by a Board of Education of race or color as a material and compelling factor in determining the assignment of children to a particular school violates the equal protection and due process clauses of Section 1 of Amendment XIV to the United States Constitution?

Constitutional and Statutory Provisions Involved

The primary constitutional provision involved is Section 1 of Amendment XIV to the U. S. Constitution (Appendix C, 14a). Also involved are the due process clause of Article 1, Section 6, New York Constitution (McKinney's Consol. Laws of N. Y., Book 2, Part 1, p. 57) (Appendix D, 14a); the equal protection and anti-discrimination clauses of Article 1, Section 11, New York Constitution (McKinney's Consol. Laws of N. Y., Book 2, Part 1, p. 59) (Appendix E, 14a); the anti-discrimination provisions of Section 40, Civil Rights Law of New York (McKinney's Consol. Laws of N. Y., Book 8, p. 48) (Appendix F, 15a); the anti-discrimination provisions of Sections 313 and 3201, Education Law of New York (McKinney's Consol. Laws of N. Y., Book 16, Part 1, p. 196, and Part 2, p. 323) (Appendix G, 16a); and the policy declarations of Section 290, Executive Law of New York (McKinney's Consol. Laws of N. Y., Book 18, 1964 Pocket Part, p. 85) (Appendix H, 17a).

Statement of the Case

1. *The Facts.*

This proceeding was instituted by parents of two public school children who reside in the East Flatbush section of Brooklyn, New York, in their own behalf and on behalf of the parents of 49 other children similarly situated, to compel the New York City Board of Education and its chief administrative officials to annul their determination which changed the initial and locally approved zoning plan for a new Junior High School by selecting these children on a racial basis for inclusion therein for the sole purpose of increasing the percentage of white children

who would attend the new school. Relief was sought because the determination by respondents was predicated upon race and color, and was thus in violation of the constitutional and statutory rights of petitioners and their children.

The new school was Junior High School 275, located at the intersection of Linden Boulevard and Rockaway Avenue in the Brownsville section of Brooklyn (Ex. D, R. 26). Its construction was authorized (R. 55) for the purpose of relieving serious overcrowding in other nearby Junior High Schools in Brownsville and in the East New York section of Brooklyn (R. 19, 46, 54, 64).

The task of preparing a zoning plan for the assignment of children upon the opening of the school in the fall of 1963 was given to Dr. Morris Blodnick, Assistant Superintendent for Local School Districts 41 and 42, since J.H.S. 275 is located within District 42 (R. 39). He prepared and submitted a plan which would have eliminated the severe overcrowding and double and triple sessions of these other junior high schools and which did not create a school population segregated as to any race or color (see 7a; Ex. D, R. 26, R. 32-33, 55-56, 63-64). In fact, Dr. Blodnick expressly refused to take race or color into account in developing his proposed zone (R. 64-65).

The Blodnick proposal received the unanimous support not only of the Local School Board (R. 32-33, 51, 54-56) but also of the principals of the area junior high schools and elementary schools (R. 64). It did not, however, receive the support of a group from Jimerson Houses, a middle income housing development sponsored by the Butcher's Union (R. 64-67). Although at least four sites for the school had been considered, the final site had been selected adjacent to that Co-op (Ex. F-2, R. 74; R. 54-60). Some of its

members strongly urged a zoning proposal deliberately designed to include sufficient white children to achieve a 50% quota of whites so that their own white children would attend school with more children of their own color (R. 64-67).

The community was aroused, and from December of 1962 running through March of 1963 a series of meetings and conferences were held by some of the respondents, especially Bernard E. Donovan as Acting Superintendent of Schools, with various groups with diverse opinions, including groups sympathetic to petitioners (R. 18, 44-45, 51, 63-69).

Review of the proposal by Dr. Blodnick was particularly in the charge of respondent Francis A. Turner, Assistant Superintendent of Schools, and head of the Central Zoning Unit (R. 38-39). He has stated his objection to the Blodnick proposal as one which "failed to accord adequate consideration to the undesirable *de facto* segregation of Negro and Puerto Rican children that would obtain" (R. 39) and one which would provide "an enrollment that would be 52 per cent Negro, 34 per cent Puerto Rican and 14 per cent white" (R. 40). Superintendent Turner modified the Blodnick proposal (R. 46) and excluded an area "to the north, with an extremely heavy Negro population" (R. 40), and included an area in East Flatbush west of Rockaway Parkway where petitioners' children reside, because the area "is predominantly white" and the children in it "are predominantly white" (R. 40). This was done to create an ethnic quota of "35.2% Negro, 33.6% Puerto Rican, and 31.2% others" (R. 19, 23, 41).

To fix this southwesterly boundary in East Flatbush, Superintendent Turner first counted white heads. It appears that he ascertained from the principal of P.S. 233, a potential feeder school located in East Flatbush, statistics of

sixth grade students who could be assigned to J.H.S. 275, by name, address, and race or color (R. 69-70). From this information, he determined where to draw the zoning line, and he discarded an extra street with only eight additional white children, because including it would negative a claim that the boundary was geographically equidistant between J.H.S. 275 and J.H.S. 285 (R. 70).

At a public hearing on March 21, 1963, at the Board's headquarters, Acting Superintendent Donovan announced that the Turner modification was being adopted as a "political compromise" (R. 68-69). Apparently a quota of 31.2% white children is a compromise between 14% and 50%. In his official Press Release on March 29, 1963, respondent Donovan referred to it as "the most practical measure of integration" (R. 19). The entire release was devoted to an explanation of how integration would be promoted, and included a lengthy apology for not eliminating overcrowding in the other junior high schools in the Brownsville area (R. 20). Indeed, respondent Donovan's statement plainly conceded that Negro and Puerto Rican children would not be transferred from overcrowded schools to J.H.S. 275 because such transfers would disturb the racial balance supposedly established by the Turner Plan (R. 20).

The Turner Plan, with its racial quota of exactly "35.2 per cent Negro, 33.6 per cent Puerto Rican, and 31.2 per cent others" was reaffirmed in a statement released by Max J. Rubin, Board President, on April 11th (R. 21-24).

Normally, but for this desire of respondents to achieve what to them is a "practical measure of integration," appellants' children would have attended J.H.S. 285, their traditional neighborhood school (R. 41).

That Brownsville and East Flatbush are individual neighborhoods is clearly disclosed in the record (R. 30-32,

52, 62; Ex. F). East Flatbush consists primarily of residential, two-family brick houses (R. 31-32, 52). On the other hand, Brownsville comprises small commercial establishments, commercial slums, deteriorating residential units, and large high rise residential developments (R. 31-32, 52). The two neighborhoods are naturally divided by two major traffic arteries: Linden Boulevard and Rockaway Parkway (R. 30-31; see also R. 59-60). The former adjoins J.H.S. 275 and is a through truck route from Brooklyn to Long Island (R. 30).

J.H.S. 275 is located in the edge of the Brownsville area, with Linden Boulevard in front, a saloon behind, a bowling alley across the street, and a large service station and a drive-in diner on two of the other corners (R. 31; Ex. F). According to Police Department statistics, the juvenile delinquency rate in the area immediately adjoining the school is 150.0 per 1000 compared to a mere 8.6 per 1000 in the neighborhood in which petitioners reside (R. 52).

Moreover, the traditional dividing line between East Flatbush and Brownsville has been E. 98th Street, one block southeast of Linden Boulevard, and one block north of Rockaway Parkway, the zoning line used by Dr. Blodnick in his plan (Ex. D, R. 26; R. 30, 32). On the official maps published by respondents, E. 98th Street is also the boundary line used by respondents to divide Local School District 41 and Local School District 42.

Petitioners contended that no reason appears and none exists for including their children in the zone for J.H.S. 275 other than the attempt to establish racial balances or racial quotas. Respondents' zoning plan would force petitioners' children to attend school out of their neighborhood and away from their friends. It would require them to travel against heavy traffic and to cross hazardous

and dangerous intersections. It would make them attend school in a vastly different environment and in an area with a juvenile delinquency rate more than 17 times greater than that in which they live.

Petitioners have not objected and do not object to having their children attend school with non-whites. There have been non-whites at school with them at P.S. 233, and there are non-whites at school with them in J.H.S. 285 today (R. 29-30, 51-52, 70-71). They do object to the assignment of their children to a school in a slum to satisfy a "political compromise" brought about by pressure on the Board of Education, solely because their children are white.

The record clearly demonstrates, and Special Term of the Supreme Court, Kings County, so found as a fact, that the compelling factor considered by respondents in modifying the Blodnick plan was the color of petitioners' children and the desire of respondents to achieve a racial percentage (R. 99-100).*

Petitioners did not contend that the Blodnick plan was infallible, nor that respondents could not change it. Petitioners contended that respondents could not lawfully or constitutionally utilize race or color, or a racial quota, or single out petitioners' children because they were white, as the primary basis for modifying it to achieve what to them would be a more desirable racial balance (cf. 4a).

2. *The Manner in Which the Federal Question was Raised.*

The federal question of the unconstitional use of race or color as a criterion for school assignment was raised

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* The findings of fact were affirmed by the Appellate Division (R. 123). The Court of Appeals, of course, passed upon questions of law only (§5501(b), New York Civil Practice Law and Rules, McKinney's Consol. Laws of N. Y., Book 7B, p. 228).

in the first pleading, the notice of motion (R. 8-9), and permeated the proceeding thereafter. The petition (R. 10-17) was founded on the claim of an unlawful and unconstitutional use of race or color as a test, and Par. 23 thereof reads:

> "23. The aforesaid policies and acts of respondents violate the Fourteenth Amendment to the Constitution of the United States in that they deprive petitioners and their children of equal protection of the laws, unreasonably and unlawfully interfere with the liberty and property of petitioners, and unreasonably and unlawfully deprive petitioners' children of the right to associate with their friends and to attend a public school in their neighborhood."

Mr. Justice Baker, at Supreme Court, Kings County, Special Term, ruled in favor of petitioners (R. 101) on the ground that the action of respondents violated Section 3201, Education Law of New York (Appendix G, 16a). He therefore felt it unnecessary to reach the constitutional questions (R. 102). The Supreme Court, Appellate Division, Second Department, before whom the constitutional questions were extensively briefed and argued, held that the Board of Education had the right to consider the question of race or color "and that in so doing it violated none of the constitutional or statutory rights of these petitioners" (R. 115; see also R. 115-120).

By their Notice of Appeal to the New York Court of Appeals, petitioners renewed their contention that the action by respondents was unconstitutional (R. 103-104). Again the question was extensively briefed and argued. The Court of Appeals held that the Education Law was not violated "nor was there any other legal impediment to its adoption" (Appendix B, 8a). That the Court of Appeals considered and rejected petitioners' contentions

that respondents' determination was unconstitutional is further demonstrated by the rejection by the majority of the vigorous dissent by Judge Van Voorhis, a dissent devoted almost exclusively to the constitutional question (Appendix B, 9a-13a).

Reasons for Granting the Writ

Petitioners submit that in this case the Court of Appeals of the State of New York has decided federal questions of importance and nationwide impact, not heretofore specifically determined by this Court, in a manner in conflict with analogous decisions of this Court and of lower federal courts in several circuits.

A. *The decision below presents issues of nationwide importance for determination by this Court.*

In admittedly using race and color as the test for school assignment herein, respondents sought to justify their action by claiming to eliminate "*de facto* segregation". However, the excuse was a mere rationalization employed to invoke the label "segregation" declared by this Court to be unconstitutional in *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294. There was, of course, no segregation, *de facto* or otherwise, in the school assignments in question prior to the action by respondents which is complained of. What there was was a racial percentage or ratio of white, Negro, and Puerto Rican children, resulting from neighborhood residential patterns, which respondents were under pressure to alter.

The Court of Appeals rejected respondents' "*de facto* segregation" contention, and held that the only question in the case was: "May (not must) the schools correct racial imbalance?" (Appendix B, 7a). Petitioners believe this restatement to be incomplete, for it omits the crucial

contention of petitioners that the *method* employed was unlawful and unconstitutional.

Petitioners do not quarrel with the end which may be sought, nor do they condemn nor seek to impede lawful measures to further quality education in integrated schools. Petitioners do contend strongly that unconstitutional means may not be employed. Petitioners object to the action of respondents because their children were included in assignment to a particular school solely because they were white, and other children were excluded from assignment to the same school because they were Negro or of Puerto Rican descent.

If respondents have the power lawfully to make the determination here made, then public officials would have the power to determine the racial composition of every school in the United States and to make assignments on the basis of race so long as they cloaked their decisions in the guise of "racial balance". Our country would be inundated by color-consciousness with a greater emphasis on the labeling of superficial characteristics that divide us than has ever existed in our history. School officials would have an open door to shuffle children from school to school depending upon the percentage of "racial balance" in vogue at the time and place. Racial tension and conflict, far from being alleviated, would become the most important of political disputes with various racial and national groups contending for percentages purportedly favorable to their own children.

In his dissent in this case, Judge Van Voorhis clearly enunciated the ultimate evils which inevitably result from efforts to balance ethnic groups (Appendix B, 9a-10a), and said that the interdiction of the 14th Amendment (and the laws and constitution of New York) ". . . signifies

more than that school boards cannot be compelled to correct racial imbalance; it means that they are not permitted to do so by law if that involves admitting or excluding groups on account of race, religion or national origin" (Appendix B, 9a).

The question posed by the instant Petition to this Court is not limited to New York State but is one of nationwide import, and needs this Court's determination because of the misapplication of the *Brown* decisions as adopted by the majority of the Court of Appeals.

The question should be decided now before thousands of school children are reassigned or rezoned to new schools pursuant to futile attempts by local school boards to adjust racial percentages up or down. Parents, children, and local school boards should have an early decision on the constitutional validity of the means used here to resolve local educational problems. The damage done to children by an assignment for racial reasons cannot be undone once implemented, nor can the money spent by local school boards to carry out such assignments be retrieved.

The Congress has recognized the national importance of this question in its enactment of Title IV of the Civil Rights Act of 1964 (Public Law 88-352, 88th Congress, H. R. 7152, July 2, 1964, 78 Stat. 241). Section 401(b) of that Title, which relates to "Desegregation of Public Education", provides:

> "(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

B. *The decision below is in conflict with analogous decisions by this Court.*

This Court has condemned the concept of governmentally established proportional racial balance in an analogous series of cases dealing wih discrimination in the composition of jury panels. In *Cassell* v. *Texas*, 339 U. S. 282, the Court rejected a contention that the Constitution required the presence of a Negro on a jury in a case involving a Negro defendant, and held that a federal statute forbade deliberate action to include a Negro on the jury.

Mr. Justice Frankfurter concurred and, speaking for himself and two others, declared that "the basis of selection cannot consciously take color into account. Such is the command of the Constitution." p. 295. His concurrence as to this limitation by the 14th Amendment as well as by the statute thereafter became the view of the Court. *Brown* v. *Allen*, 344 U. S. 443, 470-471.

As a matter of pure logic, one might argue that every jury should accurately reflect the racial composition of the community. *Cassell* and *Allen* hold that the attempt to do this would be unworkable, unlawful, and unconstitutional. See, also, *Hughes* v. *Superior Court of California*, 339 U. S. 460, 464.

The same principles apply in the instant proceeding. A major advantage of the public school system in New York is that children are exposed to varied classes and races different from themselves. What respondents seek to do is to extend this principle by determining that there shall be a certain percentage of each race in J.H.S. 275 (and presumably in every other school under their jurisdiction). But for the same reasons that this Court found proportionate racial representation on juries unconstitutional, so must this attempt by respondents be declared unconstitutional.

In the field of public education, in the second *Brown* case (349 U. S. 294), the Court applied these principles when it instructed the United States District Courts on the manner in which the first *Brown* case (347 U. S. 483) should be implemented. The Court provided the following guidelines:

> "* * * the courts may consider . . . revisions of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis . . . They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially non-discriminatory school system" (pp. 300-301).

This position was restated more recently in *Goss* v. *Board of Education of the City of Knoxville, Tenn.*, 373 U. S. 683. Condemning a transfer plan as violative of the *Brown* instructions, the Court said:

> "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 203, 89 L. Ed., 173, 184, 65 S. Ct. 226 (1944), racial classifications are 'obviously irrelevant and invidious.'"

While the Court noted that the transfer plan inevitably would maintain segregation, it stated that this fact only "underscores the purely racial character and purpose of the transfer provisions."

Furthermore, when this Court rejected the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, in *Brown* v. *Bd. of Ed-*

ucation, supra. (347 U. S. at 494-495) the famous dissents of Mr. Justice Harlan, holding the Constitution to be "color blind", were revitalized. They are even more alive today. *Bell* v. *Maryland,* —— U. S. ——, 12 L. Ed. 2d 822, at 833-834, 842, 865 fn. 42.

C. *The decision below is in conflict with several lower federal court decisions.*

The lower federal courts implementing the *Brown* cases have generally stated that race is an impermissible standard in school assignments. Thus, in *Borders* v. *Rippy,* 247 F. 2d 268 (C. A. 5, 1957), the Court said (at p. 271):

> "Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

Likewise, Chief Judge Sobeloff, speaking for the Fourth Circuit Court of Appeals, has recently said in *Green* v. *School Board of City of Roanoke, Virginia,* 304 F. 2d 118 (C. A. 4, 1964), p. 122:

> "As we have more than once made clear, school assignments to be constitutional must not be based in whole or in part on considerations of race."

In *Bell* v. *School City of Gary, Indiana,* 213 F. Supp. 819 (N. D. Ind., 1963), aff'd 324 F. 2d 209 (C. A. 7, 1963), cert. denied 377 U. S. 924, the District Court rejected an argument for the transfer of children on the basis of race to eliminate alleged racial imbalance resulting from residential ethnic patterns, saying:

> "Furthermore, requiring certain students to leave their neighborhood and friends and be transferred to another school miles away, while other students simi-

larly situated remained in the neighborhood school, simply for the purpose of balancing the races in the various schools would in my opinion be indeed a violation of the equal protection clause of the Fourteenth Amendment." p. 831.

Of similar import is *Lynch* v. *Kenston School District Board of Education*, 229 F. Supp. 740 (N. D. Ohio, 1964), In the *Kenston* case the court collected the numerous decisions similarly interpreting *Brown*, and also relied on *Collins* v. *Walker*, 329 F. 2d 100 (C. A. 5, 1964), where the Fifth Circuit reversed a state court conviction because of the deliberate inclusion of six Negroes on a grand jury panel.

Petitioners believe that the holding in *Bell* v. *School City of Gary, Indiana, supra,* in which the Seventh Circuit praised the opinion of the District Judge (324 F. 2d at 210), when applied to the facts in the instant petition inevitably dictates the conclusion reached by Judge Van Voorhis in his dissent that the determination by these respondents was unconstitutional (Appendix B, 10-12a).

Finally, the District Court in *Bell* set forth its definition of a segregated school as follows:

> "The Court is of the opinion that a simple definition of a segregated school, within the context in which we are dealing, is a school which a given student would be otherwise eligible to attend, except for his race or color, or a school which a student is compelled to attend because of his race or color." p. 829.

Petitioners believe that this definition is the only legal definition of segregation warranted by the *Brown* cases, and when applied to the instant proceeding clearly marks the school assignment of petitioners' children because they were white as a violation of the 14th Amendment.

Given: 1) the fact of inclusion of white children in, and exclusion of Negro and Puerto Rican children from, assignment to a particular school, because they are white or Negro or Puerto Rican; 2) decisions by this Court in analogous situations applying the 14th Amendment, and in the *Brown* cases themselves; and 3) the continuous declarations by the lower federal courts that assignment of children to schools must be on a non-racial basis—the nationwide importance of the serious constitutional question presented by this petition bespeaks the addition of this controversy to the regular docket of the Court.

CONCLUSION

In the light of the foregoing, it is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

No. 129

In the Matter of the Application of
ISIDORE BALABAN, & ORS.,

Appellants,

For an order &c.,

VS.

MAX J. RUBIN, & ORS., constituting the Board of Education of the City of New York, & ors., &c.,

Respondents.

Order of Affirmance by N. Y. Court of Appeals

BE IT REMEMBERED, That on the 31st day of March in the year of our Lord one thousand nine hundred and sixty-four, Isidore Balaban, & ors., the appellants in this cause, came here unto the Court of Appeals, by Samet, Gordon & Riseman, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Max J. Rubin, & ors., constituting the Board of Education of the City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frank H. Gordon, of counsel

for the appellants, and by Mr. Seymour B. Quel, of counsel for the respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Order of Affirmance by N. Y. Court of Appeals

COURT OF APPEALS

CLERK'S OFFICE

Albany, May 7, 1964

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk

APPENDIX B

[SAME TITLE]

Prevailing Opinion of Court of Appeals

Frank H. Gordon and Edward Robin, New York City, for appellants.

Leo A. Larkin, Corp. Counsel (Seymour B. Quel and Benjamin Offner, New York City, of counsel), for respondents.

Robert L. Carter, Barbara A. Morris, Jawn A. Sandifer, New York City, and John Franklin, for the National Association for the Advancement of Colored People, amicus curiae.

Leo Pfeffer, Murray A. Gordon, New York City, Joseph B. Robison and Carol Weisbrod, New York City, for American Jewish Congress, amicus curiae.

DESMOND, *Chief Judge.*

The question for decision: Will the courts hold invalid the adoption by a board of education of a "zoning plan" for a new public school because the board in addition to other relevant matters took into account, in delimiting the zone, the factor of racial balance in the new school? Stating the issue in another form: Does an otherwise lawful and reasonable districting plan for a newly instituted school become unlawful because it is intended to, and does, result in an enrollment which is one-third negro, one-third Puerto Rican and one-third non-Puerto Rican white?

Prevailing Opinion of Court of Appeals

Special Term answered the posed query in the affirmative, holding that the zone so established violated section 3201 of the Education Law, Consol.Laws, c. 16. That statute which is the only basis for Special Term's outlawry of the challenged districting reads thus: "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin." The court reasoned this way: since the children on whose behalf this proceeding was brought would, had not the new school (Junior High School 275) been built, attend a different school (Junior High School 285) in their own "neighborhood", their assignment to No. 275 was, according to Special Term, an exclusion from No. 285 and so violative of section 3201.

The Appellate Division saw the case quite differently. Section 3201, said the majority, was on its face and from its history and plain purpose, an anti-segregation statute only, a repealer of an old New York law (L. 1894, ch. 556, tit. 15, § 28) which had authorized separate schools for Negroes. The earlier statute had been held constitutional in 1900 in People ex rel. Cisco v. School Bd. of Borough of Queens, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113, and section 3201 was a legislative overruling of the Cisco ruling (see, also, Penal Law, Consol.Laws, c. 40, § 514, and Civil Rights Law, Consol.Laws, c. 6, §§ 40, 41). If, wrote the Appellate Division majority in the present case, section 3201 is to be construed so as to invalidate a zoning plan because the plan accomplishes integration, then section 3201 has been turned into a segregation law—a result exactly opposite to its purpose. Emphasizing the obvious, the court remarked that: "Boundary lines for attendance at a new school

must be fixed somewhere" and that "A zone for a new school must necessarily take away part of the zone or zones theretofore established for already existing schools." Two of the Appellate Division Justices, concurring for reversal, came to the same result by a simpler route. The board, says the concurring opinion, acted reasonably and "within the limits of sound discretion." The zoning, they found, was not "forced solely by racial considerations." If, they said, the racial factors are disregarded, other considerations "point irrevocably to the placement of the children in the very school which the board has selected." Since, then said the concurring Justices, application of all other appropriate and available criteria dictated the same result, "It is unnecessary to this decision to consider the right of the Board of Education to inquire into the race or color of the children".

The facts are not in dispute. The new school is Junior High School 275 located in the Brownsville section of Brooklyn and authorized by the city's Board of Estimate for the purpose of relieving overcrowding in several existing junior high schools. The task of preparing a zoning map for the new facility was first assigned to a Dr. Blodnick, Assistant Superintendent for Local School Districts 41 and 42 (the new school is in District 42). The Blodnick plan received some community support but higher officials of the Board of Education rejected it for several reasons, one of them being the failure of Dr. Blodnick so to draw his zone as to prevent any measure of *de facto* segregation of negro and Puerto Rican students into the new building. Under that first plan the enrollment would have been 52% negro, 34% Puerto Rican and 14% non-Puerto Rican white.

Prevailing Opinion of Court of Appeals

A new proposal was then formulated by Assistant Superintendent of Schools Turner who was also head of the Central Zoning Unit. He modified Dr. Blodnick's districting map by excluding a northerly part with a heavy negro population and including a predominantly white area where reside petitioners' 2 children and some 49 other white children on whose behalf the proceeding is brought. The Turner modification was adopted by the Board of Education with the result that new Junior High School 275's population will be approximately one-third negro, one-third Puerto Rican and one-third non-Puerto Rican white. The children whose parents are contesting the Turner zoning live within walking distance of new School 275 and nearer to—or at least no farther from—School 275 than School 285. The latter building, petitioners assert, is in their residential "neighborhood" which contrasts to the part-slum, part-deteriorated residence area and part-high-rise apartment "neighborhood" in which was built new Junior High School 275. It should be mentioned that all the children scheduled for admittance into School 275 will be in their first year of junior high school so that no one is being transferred from one school to another.

There can be no doubt (since Brown v. Board of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873) that *de jure* segregation is unconstitutional. The question, however, as to whether there is an affirmative constitutional obligation to take action to reduce *de facto* segregation is simply not in this case. The issue, we repeat, is: May (not must) the schools correct racial imbalance? The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation.

Prevailing Opinion of Court of Appeals

Therefore, we hold, section 3201 of the Education Law is in no way violated by this plan, nor was there any other legal impediment to its adoption.

If, applying the conventional (CPLR § 7803, subd. 3) test of an administrative ruling, we look to see whether the Turner zoning is arbitrary, capricious or unreasonable, the answer must again be in the negative. The Board of Education has express statutory power to select a site for a new school and to "determine the school where each pupil shall attend" (Education Law, § § 2556, 2503, subd. 4, par. d). There are no oppressive results of the choice here made by the board. No child will have to travel farther to new School 275 than he would have to go to get to his "neighborhood" school.

The order should be affirmed, without costs.

Dissenting Opinion of Court of Appeals

VAN VOORHIS, *Judge* (dissenting).

That race was a material factor, indeed the dominant factor and controlling consideration in redrawing the boundary lines of these school zones, is too clear to be denied. The petition so alleges, and the answer admits it. As is stated in the majority opinion in this court, the result was to obtain an enrollment of one-third white children in Junior High School 275 instead of 14% white under the original plan. The avowed purpose and reason for drawing the boundary lines in the manner ultimately approved by the Board of Education was to achieve a larger proportion of white children in comparison with the Negroes and Puerto Ricans.

This, as it seems to me, is the reverse of anti-discrimination. The principle of anti-discrimination is that each person shall be treated without regard to race, religion or national origin. It is discrimination to admit a person because he is a Negro or a Pole, Catholic, Anglo-Saxon, Jew, and so on. If persons can legally be admitted because they belong to any of these groups, then they can be excluded for the same reason. Such a result would be contrary to the equal protection clause of the Federal and State Constitutions (U.S.Const., 14th Amdt. § 1; N.Y. Const. art. I, § 11), as well as sections 313 and 3201 of the New York State Education Law, section 40 of the Civil Rights Law and section 290 of the Executive Law, Consol.Laws, c. 18. This signifies more than that school boards cannot be compelled to correct racial imbalance; it means that they are not permitted to do so by law if that involves admitting or excluding groups on account of race, religion or national origin. If school children, employees, tenants or others can be admitted because they

are Negroes, they can also be admitted because they are Aryans, and they or other racial groups can be excluded on the same basis. Color is not the only factor in integration. It would be hopeless for any school board or other governing body to try to assemble an ideal amalgam by admitting the right quotas or other proportions of cultural, religious or ethnic groups. The principle is not unlike that enunciated in Hughes v. Superior Ct., 339 U.S. 460, 464, 70 S.Ct. 718, 721, 94 L.Ed. 985, where the Supreme Court said that to prevent a State from banning picketing to hire more Negroes "would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." If Negroes could legally be admitted because they are Negroes, it follows that they could be excluded for the same reason: and similarly with Jews, Catholics, Protestants, Italians, northern Europeans or any other ethnic or religious group.

So long as these distinctions are obliterated, for the purpose in question, integration and anti-discrimination are served. Just so soon, however, as the tables are turned, and the position taken that any of these multiform groups are to be promoted in competition with other groups, it becomes discrimination not integration. This is recognized by the farsighted members of all of the minority groups in condemning the quota system, which it closely resembles.

On May 4, 1964 the United States Supreme Court denied an application for certiorari to review Bell v. School

City of Gary, Indiana, 7 Cir., 324 F.2d 209, affg. D.C., 213 F.Supp. 819. What was involved in that case explicitly appears from the opinion of the District Judge, whose judgment was affirmed by the Federal Court of Appeals and declined to be reviewed by the Supreme Court. It makes clear that there is no essential difference between whether the result is attained by drawing the boundaries of new districts, altering the boundaries of existing districts, or transferring students from one district to another, if it be done on account of race. The charge in the Bell case was that a new school district was laid out and boundaries changed of existing school districts, and children "bussed" from one school district to another for the purpose of maintaining segregated schools. The major contention of the plaintiffs therein, as stated by the trial court, was "that the defendant, by the manner in which it has drawn its school district boundaries, has purposely and intentionally maintained a segregated school system thereby depriving a majority of the Negro students in Gary from attending schools with white students. The Board, on the other hand, specifically denies that there has been any intentional segregation of the races in the Gary school system. As a matter of fact, the School Board and its staff insists that they are color blind, so far as the races are concerned, in the administration of the Gary school system. They maintain no records on the basis of race or color". Transfers of students were permitted on request of the student or parent, "the reason for the transfer request is considered and is allowed or denied depending upon the apparent reasonableness and desirability of the transfer and no racial factors are considered in allowing or disallowing a transfer."

The neighborhood school was described as being a long and well-established institution in American public school education, "almost universally used, particularly in the larger school systems" and, in the Bell case, the court said further: "With the use of the neighborhood school districts in any school system with a large and expanding percentage of Negro population, it is almost inevitable that a racial imbalance will result in certain schools."

Although the holdings of the trial court and Federal Court of Appeals in the Bell case were that the educational authorities were not required to redistrict or change their student transfer arrangements, this was for the reason that they had not taken race into account in laying the boundaries or providing for student transfers between school districts. That is exactly what the Board of Education of the City of New York did do in the present instance. It makes no difference in legal effect that Negroes considered themselves aggrieved in the Gary, Indiana, case and that the objectors here are whites. The Constitution and statutes forbid racial discrimination, which applies equally to white or nonwhite. The principle of the Gary school decision applies to this situation. There the acts of the educational authorities were upheld for the reason that the distributions made were not actuated by race as a factor. The same principle, as it seems to me, requires that the school zoning by the board in this case should be annulled because it acted on the basis of racial distinction.

In Brown v. Board of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, it was held that segregation of white and negro children in the public schools of a State denied the equal protection of the laws if it was done on the basis of race. This was, as stated in the opinion, for the reason that

Negroes "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race." Under the reasoning of that decision, it likewise denies the equal protection of the laws to make the admission or exclusion of children depend upon their color regardless of whether their color be white or black.

Both Special Term and the Appellate Division assumed jurisdiction, treating this as a justiciable question, and both held that race was a material factor in the shaping of these school districts in Brooklyn in the manner done by the board. In view of the decisions that the courts have jurisdiction of districting where violation of equal protection clause of the Fourteenth Amendment is involved (Baker v. Carr, 369 U.S. 186 82 S.Ct. 691, 7 L.Ed.2d 663; Y. M. C. A. v. Simon, 370 U.S. 190, 82 S. Ct. 1234, 8 L.Ed.2d 430), it seems to me that we are confronted with the responsibility of making a judicial determination concerning whether race, religion, national origin or other similar considerations can operate as decisive factors in the creation or alteration of school zones or districts and in other aspects of the administration of the educational system of the State.

I concur in the memorandum opinion by BAKER, J., at Special Term, except that I base my conclusions also upon the State and Federal Constitutions and upon the other New York State statutes above mentioned.

The order appealed from should be reversed and the judgment of Special Term reinstated.

DYE, FULD, BURKE, SCILEPPI and BERGAN, *JJ.*, concur with DESMOND, *C.J.*

VAN VOORHIS, *J.*, dissents in a separate opinion.

Order affirmed.

APPENDIX C

U. S. Constitution, Amendment XIV, Section 1, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

Article 1, Section 6, of the New York State Constitution, provides, in part, as follows:

> "* * * No person shall be deprived of life, liberty or property without due process of law."

APPENDIX E

Article 1, Section 11, of the New York State Constitution, provides:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

APPENDIX F

Section 40, Civil Rights Law of New York State, provides, in part, as follows:

> "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any such place shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color or national origin, or that the patronage or custom thereat, of any person belonging to or purporting to be of any particular race, creed, color or national origin is unwelcome, objectionable or not acceptable, desired or solicited. * * * A place of public accommodation, resort or amusement within the meaning of this article, shall be deemed to include * * * kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; * * *"

APPENDIX G

Section 313, Education Law of New York State [applicable to institutions of post-secondary grade] provides, in part, as follows:

> "(1) Declaration of policy. It is hereby declared to be the policy of the state that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin, * * *.
>
> "(3) Unfair educational practices. It shall be an unfair educational practice for an educational institution after September fifteenth, nineteen hundred forty-eight:
>
> "(a) To exclude or limit or otherwise discriminate against any person or persons seeking admission as students to such institution because of race, religion, creed, color, or national origin; * * *.
>
> "(d) It shall not be an unfair educational practice for any educational institution to use criteria other than race, religion, creed, color or national origin in the admission of students. * * *."

Section 3201, Education Law of New York State, provides:

> "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color or national origin."

APPENDIX H

Section 290, Executive Law of New York State, provides:

> "This article shall be known as the 'Law Against Discrimination.' It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights; and the legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A state agency is hereby created with power to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in housing accommodations and in commercial space because of race, color, creed, or national origin, and to take other actions against discrimination because of race, creed, color or national origin, as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes."

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IN THE

Supreme Court of the United States

October Term, 1964

No. 350

In the Matter of the Application of ISIDORE BALABAN, PHYLLIS BALABAN, ARTHUR GOTTLIEB and LENORE GOTTLIEB,
Petitioners,

for an order under Article 78 of the Civil Practice Act

—against—

MAX J. RUBIN, JAMES B. DONOVAN, CLARENCE SENIOR, JOSEPH G. BARKAN, JOHN F. HENNESSY, MRS. MORRIS SHAPIRO, LLOYD K. GARRISON, MORRIS IUSHEWITZ, and AARON BROWN, constituting the Board of Education of the City of New York; CALVIN E. GROSS, Superintendent of Schools; BERNARD E. DONOVAN, Executive Deputy Superintendent of Schools; and FRANCIS A. TURNER, Assistant Superintendent of Schools,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioners seek a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, entered May 7, 1964, affirming an order of the Supreme Court of New York, Appellate Division, Second Depart-

ment, entered March 10, 1964, which reversed a judgment of the Supreme Court of New York, Kings County, entered September 12, 1963, which had nullified an attendance area zone established by the respondents for a new junior high school in the Borough of Brooklyn, City of New York, known as Junior High School 275.

Opinions Below

The opinion of the Supreme Court, Kings County (BAKER, J.) is reported in 40 Misc 2d 249, 242 N.Y.S. 2d 973. The opinions of the Appellate Division of the Supreme Court, Second Department, are reported in 20 AD 2d 438, 248 N.Y.S. 2d 574. The opinions of the New York Court of Appeals are reported in 14 NY 2d 193, 199 N.E. 2d 375.

Question Presented

Are the petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution violated by the adoption of an attendance area zone for an integrated school whereby the petitioners' children and all other children residing within the zone are assigned to the new school, regardless of their race, creed, color or national origin?

Facts

(1)

The question of site selection for new Junior High School 275 came before the Board of Estimate of the City of New York on March 10, 1960 (Cal. No. 117). Three alternate sites were considered: (1) the entire block bounded by Rockaway, Riverdale, Thatford and Newport Avenues, (2)

the entire block bounded by Rockaway, Lott, Thatford and Hegeman Avenues, and (3) the entire block bounded by Rockaway, Hegeman and Thatford Avenues and Linden Boulevard. (Journal of Proceedings, Board of Estimate, March 10, 1960, p. 2166.)

On March 24, 1960 (Cal. No. 22) the Board of Estimate, on recommendation of the Board of Education, selected site 3, upon which J.H.S. 275 has since been erected. (*ibid.*, March 24, 1960, p. 2501.) Dr. Francis A. Turner, who, as head of the Central Zoning Unit, is a member of the Site Selection Committee of the Board of Education, explains why this site was recommended (R. 40):

> "The school site, at Linden Boulevard and Rockaway Avenue, is located in a fringe area, very close to an area to the west which is predominantly white. The site was selected with a view to feeding into it children from the East Flatbush area, who are predominantly white, as well as children from two Brownsville schools, who are predominantly Negro and Puerto Rican, so as to achieve a measure of integration among the school children in the new school."

To Dr. Morris Blodnick, Assistant Superintendent of Schools in charge of that district, was assigned the task of preparing a proposed zone for the new school. (His plan is outlined in yellow on the map, R. 47.) The Board of Education rejected the Blodnick proposal because the school site would not be centrally located and because Dr. Blodnick "had failed to accord adequate consideration to the undesirable *de facto* segregation of Negro and Puerto Rican children that would obtain in J.H.S. 275 if his plan had been adopted" (R. 39).

In the zoning plan adopted by the respondents for J.H.S. 275, the westerly line of the zone was established at East 93rd Street, because it is equidistant between J.H.S. 285 and J.H.S. 275. (J.H.S. 285 is the school which petitioners' children would have attended if J.H.S. 275 had not been built.) None of the children who live in the area bounded by East 93rd Street on the west are further from J.H.S. 275 than from J.H.S. 285 and those who live east of East 93rd Street are closer to the new school than to J.H.S. 285 (R. 41).

In the establishment of a school zone the Board of Education considers the following six factors:

1. Distance from home to school.
2. Utilization of school space.
3. Convenience of transportation.
4. Racial integration of the school.
5. Topographical barriers.
6. Continuity of instruction.

(R. 13.)

All of these factors were considered and were satisfactorily resolved by the Board of Education in the zone it adopted for Junior High School 275.

The zoning plan adopted by the Board of Education was the result of most careful deliberation and consideration of many factors and opinions. As is apparent from Petitioners' Exhibits "A" and "B" (R. 18-24), as well as from the affidavit of Dr. Turner, assistant superintendent of schools in charge of zoning, consideration of the various factors

which were relevant to outlining a zone for Junior High School 275, extended over a period of several months. During that time, the school officials concerned with the project conferred with and heard the arguments and objections of a great number of interested civic groups and their representatives, including the East Flatbush Civic Association. (R. 44)..

Upon review of the exchange of information, objection and suggestion over that period of time and a consideration of the plan recommended by Dr. Blodnick, the Board of Education approved the plan challenged in this proceeding.

With respect to the factor of the distance from home to school, the plan adopted by the Board was markedly superior to Dr. Blodnick's tentative proposal. Thus, a sizable number of the children in the East Flatbush area included in the Board's plan will have a shorter distance to walk to new J.H.S. 275 than to J.H.S. 285. Moreover, the greatest proportion of those children from the Brownsville area who are not included in the new J.H.S. 275 zone will travel much shorter distances by attending other schools. Under Dr. Blodnick's proposal, they would have been obliged to travel a much greater distance to attend new J.H.S. 275 than any of the other children in the new J.H.S. 275 zone. By these modifications, the travel distances favored the adopted plan, without disturbing continuity of education.

Convenience of transportation, another major factor, appeared to be of equal weight in both plans. Of the remaining two factors, viz., utilization of school space and racial integration of the school, the Board weighed the latter objective against *immediate* attainment of utilization of school space, and again, the factor of continuity of instruction.

Attainment of maximum utilization of school space was planned over a three-year period in order to accommodate the factors of racial integration and continuity of instruction.

The use of the factor of integration of the enrollment in the new J.H.S. in the selection of the school site and establishment of the new zone was explained by Dr. Bernard Donovan, Executive Deputy Superintendent of Schools (R. 19):

> "Although designed to relieve overcrowding of junior high schools in Brownsville, the specific site of Junior High School 275 was selected by the Board of Education primarily because it is located on the fringe of an area which is predominantly Negro and Puerto Rican and near an area in which the large majority of residents is white. Board of Education policy is that integration be one of several factors in the selection of school sites and in the zoning of schools. The Board believes that integration is an important requirement for good education, and that segregated education is inferior education."

It was expected that the seventh year pupils (the only class to be enrolled in the first year of operation) would have a racial composition of 35.2 per cent Negro, 33.6 per cent Puerto Rican and 31.2 percent white (R. 18-24).

As the President of the Board of Education stated (Pet., Exhibit "B" R. 22). "The weight to be attached to each [of the six factors in the Board's decision] necessarily varies under the circumstances of each case." Ultimately, of course, the decision as to just what weight to give each of the factors is for the Board to decide. Thus, the Board gave greater weight to the racial integration factor than had

Dr. Blodnick. For the latter, in practically ignoring that factor, would have created at J.H.S. 275 a *de facto* segregated school. The Board felt that factor had not been weighed properly: "The Board believes that integration is an important requirement for good education, and that segregated education is inferior education" (R. 19).

ARGUMENT

No substantial federal question is presented by the petition.

(1)

The petition (p. 3) refers to the Fourteenth Amendment as the primary constitutional provision involved and then lists the constitutional and statutory enactments of the State of New York which, it states, are also involved. The ruling of the New York Court of Appeals that the latter enactments were not violated by the respondents is binding on this Court and does not raise a federal question. *Cramp* v. *Board of Public Inst.*, 368 U.S. 278 (1961); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *A.F.L.* v. *Watson*, 327 U.S. 582 (1946).

This leaves for the consideration of this Court the sole issue as to whether the petitioners' rights under the Fourteenth Amendment have been violated. That they have not been violated is established by the undisputed fact that J.H.S. 275 is an integrated school and admission to it is open to all children of junior high school age who live within the attendance zone of that school, and neither their race, color, creed nor national origin is made a criterion for their admittance.

The decision below is not in conflict with any decisions of this Court or of lower federal courts. In every case decided by this Court and lower federal courts in this field the constitutional rights of the complainants have been held to be violated only upon a showing that state action has resulted in the maintenance of racially segregated schools. In the earlier cases, of which *Brown* v. *Board of Education*, 347 U.S. 483 (1954) is typical, the state action consisted of the enactment of statutes or constitutional provisions which either required or permitted boards of education to operate segregated schools. In the more recent cases, the state action consisted of assignment plans or pupil transfer regulations which had the purpose and effect of separating children in schools according to their race. Typical of such cases are *Goss* v. *Board of Education of Knoxville, Tenn.*, 373 U.S. 683 (1963); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir., 1962); *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920 (4th Cir., 1962), cert. den. 374 U.S. 827 (1963).

Petitioners ignore the rulings in these cases and are content to quote isolated statements in the opinions without regard to the facts or the determination in each case. Thus petitioners (p. 14) quote the following from *Goss* v. *Board of Education, supra*, 373 U.S., at p. 687: "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment." This Court condemned the transfer plan in the *Goss* case, stating (p. 689): "But no official transfer plan or provision *of which racial segregation is the inevitable consequence* may stand under the Fourteenth Amendment." (Emphasis added.)

The *Goss* action was brought by Negro pupils who claimed that a pupil-transfer plan established by the public school authorities of Knoxville, Tennessee, violated their constitutional rights. The Court quoted the provisions of the plan, which established different transfer criteria for white and for colored children. The Court then said (373 U.S., at p. 686):

> "It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation."

The Court concluded as follows (p. 688):

> "We hold that the transfer plans promote discrimination and are therefore invalid."

Petitioners (p. 15) quote the following from *Green* v. *School Board of City of Roanoke, Virginia, supra*, 304 F. 2d 118, 122:

> "As we have more than once made clear, school assignments to be constitutional must not be based in whole or in part on considerations of race."

The Court applied this principle in condemning the Roanoke pupil assignment system whereby white children were initially assigned to schools in one section of the city and Negro children to schools in another section, regardless of how near they might reside to the respective schools. In addition to the "discrimination inherent in the initial assignment system", the Court found the rules for transferring pupils were more stringent when the child applying for a transfer was a Negro. (304 F. 2d, at p. 123.) The Court held "the unequal application of transfer criteria"

to be a "violation of the Negro pupils' rights under the Fourteenth Amendment." (*ibid.*)

In *Borders* v. *Rippy*, 247 F. 2d 268 (5th Cir., 1957), cited at p. 15 of the petition, the Court held the complainants' constitutional rights to be violated by a dual racial school assignment plan under which "no Negro children could go to school with the whites." (p. 270.)

Petitioners' reliance on broad general statements without regard to the facts or the courts' holdings emphasizes the wisdom of the caveat expressed on more than one occasion by this Court as to the unreliability of such statements when urged in support of asserted constitutional rights.

In *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944), Mr. Justice JACKSON, writing for the Court, said (pp. 132-133):

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. * * * General expressions transposed to other facts are often misleading."

In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), this Court said (pp. 343-344, per FRANKFURTER, J.):

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

Again, in *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), Mr. Justice FRANKFURTER, writing for the Court, concluded

his opinion with the cogent observation that "Generalizations are treacherous in the application of large constitutional concepts." (p. 469.)

Petitioners (pp. 13-14) cite and quote from *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. 1963), aff'd 324 F. 2d 209 (7th Cir., 1963), cert. den. 377 U.S. 924 (1964), in which the Negro plaintiffs charged that the City was operating a segregated school system. The Court found that in some of the schools there was a preponderant enrollment of Negroes but that this resulted not from affirmative action of the school authorities but by reason of the segregation of the races in distinct sections of the City, in other words, what is known as *de facto* segregation. The Court rejected the plaintiffs' contention that the City was required, under mandate of the Constitution, to integrate the public schools, saying (p. 829) that "racial balance in our public schools is not constitutionally mandated."

The *Bell* decision lends no support to the petitioners. That action was brought, as has been noted, by Negroes to compel the school authorities to eliminate racial imbalance in the public schools. The instant proceeding was instituted by white persons who claim to have the constitutional right, perforce of the Equal Protection Clause of the Fourteenth Amendment, to compel the Board of Education to establish J.H.S. 275 as a *de facto* segregated school. Petitioners' position is contrary to the spirit, if not the letter, of the School Segregation Cases.

In the *Brown* opinion this Court held that the plaintiffs "by reason of the segregation complained of [are] deprived of the equal protection of the laws guaranteed by the Four-

teenth Amendment" (347 U.S., at p. 495). This Court has said: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1954). The action of the Board of Education of which petitioners complain does not involve any discrimination, invidious or otherwise, because all children residing in the zone of J.H.S. 275 and possessing the necessary educational requirements are entitled to enroll in that school, regardless of their race, color or creed.

It affirmatively appears from the petition and the exhibits annexed to it that the new junior high school will be opened as an integrated school under the zone adopted by the Board of Education. Nothing decided in *Brown* v. *Board of Education* or in any subsequent case prevents the Board of Education from considering racial and ethnic factors in school zoning, unless it results in establishing a segregated school.

In accord with the decision of the Court of Appeals in this case are the following recent decisions. *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878 (Sup. Ct., Cal., 1963); *Morean* v. *Board of Education of Montclair*, 42 N.J. 237, 200 A. 2d 97 (Sup. Ct., N.J., 1964); *Fuller* v. *Volk*, 230 F. Supp. 25 (Dist. Ct., N.J., 1964).

In *Lynch* v. *Kenston School District Board of Education*, 229 F. Supp. 740 (Dist. Ct., Ohio, 1964), cited by petitioners (p. 16), the Court said (p. 744):

> "Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate

> that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them."

Petitioners' children have not been made the objects of racial discrimination for the simple reason that J.H.S. 275 is an integrated school, admission to which is open to all residing within its zone regardless of race, creed or color.

(2)

Throughout their petition (pp. 5, 6, 7, 8, 13) petitioners assert that the Board of Education has unlawfully established in the new school an unlawful quota system based on race. The record provides ample contradiction of their claim (R. 23, 43-44). The percentages of 35.2 Negro, 33.6 Puerto Rican and 31.2 per cent white pertain to the 544 pupils who were expected to enroll in the new school in September, 1963 (R. 23). With the passage of time, as families move into and out of the zone of J.H.S. 275, these percentages will change, because any child living in the zone and possessing the required educational qualifications will be admitted to that school without regard to race, color or creed (R. 44). Residence within the school zone and not the percentages of the racial and ethnic groups in the entering class in September, 1963 is the determining factor of admission to the school now and in the future.

Petitioners' claim that a racial quota system has been established by the Board of Education is utterly without factual support and their assertion (p. 6) that the zoning plan establishes a "racial quota of exactly 35.2 per cent

Negro, 33.6 per cent Puerto Rican and 31.2 per cent others" is on its face absurd.

The Appellate Division of the New York Supreme Court rejected petitioners' contention in the following language (20 A D 2d, pp. 448-449, 248 N.Y.S. 2d, p. 584):

> "Petitioners' argument that J.H.S. 275 was zoned to establish a racial quota is wholly untenable. Indeed, it is conceded that a quota system is repugnant and illegal; but there was no quota system in the case at bar.
>
> All that the officials of the Board stated is that in September, 1963 the ethnic composition of J.H.S. 275 was expected to be 35.2% Negro, 33.6% Puerto Rican, and 31.2% white. A quota system is the establishment of a fixed immutable ratio in order to achieve and thereafter to *maintain and preserve* the same racial composition. That is not the intent here. Once the geographic boundaries (or zone) for attendance at J.H.S. 275 are prescribed, every child residing in that zone, if he has the necessary educational qualifications, may go to that junior high school, regardless of race or color and without any limitation as to percentage or number of qualified pupils of his own or of any other race or color. In actual operation, it is impossible to maintain and preserve the original ethnic composition, and there never was any intent to do so. In our opinion, the quota issue raised by petitioners is intended merely to give a semblance of illegality to the zone as fixed by the Board." (Italics by the Court.)

(3)

In their petition to the New York Supreme Court (R. 17) and in their present petition (p .4), petitioners claim that

the zone established by the Board of Education for J.H.S. 275 was unconstitutionally predicated on race and color. They thus fail to distinguish between discriminatory state action based on race or color and awareness or cognizance of color by the state in its efforts to achieve equality among the races. It is impossible to eliminate consideration of race or color from any plan to end *de facto* segregation in the public schools. As the New Jersey Supreme Court observed in a recent case, *Morean* v. *Board of Education of Montclair*, 42 N.J. 237, 200 A. 2d 97, 100 (1964):

> "Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation."

The petition (p. 17) asserts as a fact the "inclusion of white children in, and exclusion of Negro and Puerto Rican children from assignment to a particular school, because they are white or Negro or Puerto Rican." This alleged "fact" is the direct opposite of the finding by the New York Court of Appeals (Petition, Appendix B. p. 7a): "The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation."

Petitioners invoke the Fourteenth Amendment not as a shield against discriminatory state action but as a sword to compel the respondents to create a *de facto* segregated school at J.H.S. 275. In the first *Brown* decision, 347 U.S. 483, this Court, while holding that the operation of *de jure* segregated public schools is unconstitutional, also condemned as educationally inferior *de facto* segregated

schools. This Court quoted with approval the following holding of the Kansas court in one of the cases decided with *Brown* (347 U.S. at p. 494):

> "*Segregation of white and colored children in public schools has a detrimental effect upon the colored children.* The impact is greater when it has the sanction of the law; * * *." (emphasis supplied)

Petitioners have a constitutional right to attend an integrated school. They have no constitutional right to choose which of two integrated schools they shall attend.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 13, 1964.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 350

In the Matter of the Application of

ISIDORE BALABAN, PHYLLIS BALABAN, ARTHUR GOTTLIEB and LENORE GOTTLIEB,

Petitioners,

for an order under Article 78 of the Civil Practice Act

—against—

MAX J. RUBIN, JAMES B. DONOVAN, CLARENCE SENIOR, JOSEPH G. BARKAN, JOHN F. HENNESSY, MRS. MORRIS SHAPIRO, LLOYD K. GARRISON, MORRIS IUSHEWITZ, and AARON BROWN, constituting the Board of Education of the City of New York; CALVIN E. GROSS, Superintendent of Schools; BERNARD E. DONOVAN, Executive Deputy Superintendent of Schools; and FRANCIS A. TURNER, Assistant Superintendent of Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

It was almost inevitable that respondents, to oppose certiorari, would find it necessary to rely upon a tortured statement of the case and thus flee from the reality of the

issue as stated by the Court of Appeals, which was bottomed on the facts as found by Special Term (Supreme Court, Kings County).

Despite the insistence by the Court of Appeals that action by the respondent school authorities to adjust "racial balance" or "racial imbalance" was the question before it (Petition, Appendix B, pp. 4a and 7a), respondents repeatedly urge instead that, short of their determination, the new junior high school would have opened in the fall of 1963 as a *de facto* segregated school. This contention that J. H. S. 275 would have been a segregated school was not found to be factual by Special Term, nor does the record support it, except perhaps in the conclusory averments of the affidavit by respondent Turner.

It is also legally untenable. The mere existence of a large percentage of a single ethnic group within a governmentally established unit has no constitutional significance in any event (*Wright* v. *Rockefeller*, 376 U. S. 52).

Coupled with this contention, introduced as a red herring, and the solace respondents would seem to seek in their claim of eliminating "segregation" and promoting "integration", is the unfounded and slighting suggestion that petitioners are trying to compel the respondent school authorities to establish the new junior high school "as a *de facto* segregated school" (Brief in Opposition, pp. 11 and 15). This is simply not so. The absence of petitioners' children from the new school actually has merely reduced the percentage of non-Puerto Rican white children from approximately 31% to approximately 23%.

Furthermore, petitioners' children have attended school in the past with Negro and Puerto Rican children, they do so now, and will undoubtedly do so in the future. Peti-

tioners resent any implication that they are racists or bigots. They feel that they are entitled to object to the assignment, made because they are white, of their children to J. H. S. 275, especially when such assignment is admittedly the result of a political compromise under pressure. Moreover, they particularly object to such a racial selection of their children when it means that their sons and daughters, of tender age, must all face severe traffic hazards and dangerous crossings to attend a school which is out of their own neighborhood, is in another school district, and is in a neighborhood which is properly classified as a high crime rate slum area.*

For respondents further to declaim that the new school is open to all who reside within its zone, regardless of race or color, is also a distortion. It is clear that respondents redrew the school zone boundaries because of the race and color of the particular residents thereby encompassed. Aside from any other indication that this is so (R. 69-70), the tenths in the racial percentages announced by respondents, *viz*: 35.2% Negro, 33.6% Puerto Rican. and 31.2% white (R. 99), could only have been determined by them by an accurate *racial* survey of the school children concerned. And, Special Term found as a fact that the racial and ethnic balance accomplished by moving the zone boundary was not fortuitous but was the result of a fixed purpose on respondents' part to bring more white children into the new school (R. 100).

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* Although not found as a fact by Special Term, the two appellate courts repeated in their opinions respondents' contention that all of the children involved live closer to, or no further from, the new school. Aside from the obvious that distance is no excuse for unconstitutional racial discrimination, the fact is, and it clearly appears from the maps in the record, that some of the children involved would have more street blocks to walk, and more streets to cross, in attending the new school.

This contention by respondents in opposition to the petition for a writ of certiorari, namely that they have done nothing more than adopt a school zone boundary within which all children are required to attend the same school regardless of race, creed, color, or national origin (Brief, pp. 2, 7, 12 and 13), is basic to both their factual and legal arguments. Apart from the factual distortion, it is from a legal viewpoint a mere circumlocution designed to avoid the issue before this Court. A similar argument was made in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347, and rejected by Mr. Justice Frankfurter who said:

> "While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights."

The respondents in *Gomillion* could, with the same logic employed by respondents here, have argued that the Negro citizens of Tuskegee were not being deprived of any rights since they had exactly the same voting rights after the racially inspired gerrymandering of voting districts in that case that they had before, the only difference being that they had to exercise them in a different municipal entity. It was, of course, the use of race as the basis for drawing the boundary lines that was deemed unconstitutional, precisely the issue before the Court in the instant matter.

Respondents also urge that the petition relies solely upon cases holding that segregation is unlawful, and that the statements declaring all racially based school assignments to be unconstitutional are taken out of context (Brief, pp. 8-11). This argument totally ignores the jury

cases cited by petitioners which clearly hold that governmental determinations based upon race whether for the purpose of exclusion or inclusion of a particular racial group are unconstitutional. No reason is suggested why the jury cases are not decisive of the issues now before this Court. The statements quoted by petitioners from the school segregation cases reflect the continued vitality of the principles of the jury cases.

Respondents would have this Court believe that a case such as *Green* v. *School Board of City of Roanoke, Virginia*, 304 F. 2d 118 (C. A. 4, 1962) (Brief, p. 9), has no applicability to the instant matters. Yet the precise holding in *Green* that "the unequal application of transfer criteria" is unconstitutional (p. 123) is directly applicable to a central issue in this case.

Respondents seek to distinguish *Green* and similar cases such as *Goss* v. *Board of Education of the City of Knoxville, Tenn.*, 373 U. S. 683, on two grounds. First, respondents contend these cases are inapplicable because they involved state action to promote racial segregation (Brief, pp. 8-11). Second, by stating as the "facts" of the case before this Court not those facts found by the Special Term (which were undisturbed on appeal), but their own self-serving declarations, presented to and rejected by the Court, respondents seek to imply that their classification of petitioners by race was but one of many equally important criteria they took into account (Brief, pp. 2-6). On this tenuous foundation, they build, for example, their distinction of *Green*, by urging that there such factors as distance were deliberately ignored (Brief, p. 9).

This attempt to brush aside one line of petitioners' authorities collapses when one considers (a) the central factual determination made by the Justice sitting at the

trial level and (b) the rationale of the decisions respondents claim are irrelevant.

Mr. Justice Baker found not only that as the result of a "fixed purpose" on the part of respondents their "determination was based in material part on racial factors" which were "incapable of separation from the other factors alleged to have been considered" (R. 100), but that it was doubly discriminatory. Not just were white children included in the school zone for J. H. S. 275 "upon the basis of their race", but Negro and Puerto Rican children from overcrowded schools were excluded from "access to a new under-utilized school because white children, who do not need a new school, are required to attend." (R. 101).

Nothing justifies respondents' argument that the results in *Goss* v. *Bd. of Education, supra,* or *Green* v. *School Board of City of Roanoke, supra,* turned on the fact that the result of the school boards' transfer plans was maintenance of *de facto* segregation, or that the sole criterion used was race. In *Goss* the Court spelled out what would be a valid determination by school authorities: one which was "not based on any state-imposed racial conditions", or which allowed "transfers to or from any school regardless of the race of the majority therein." (373 U. S. at 688-689). In *Green* the Court stated the legal rationale of its decision as follows (304 F. 2d at 122):

> "This court has on several occasions recognized that residence and aptitude or scholastic achievement criteria may be used by school authorities in determining what schools pupils shall attend, so long as racial or other arbitrary or discriminatory factors are not considered. (citing cases) But if these criteria, otherwise lawful, are used in a racially discriminatory manner, the resulting assignment is not saved from illegality."

It is thus clear that the use of race as a criterion, not any resulting segregation, is what is fatal; and lengthy argumentative "fact" statements about use of non-racial criteria are totally irrelevant, since if one material test used is race, that factor taints the whole result.

Respondents urge that they have not established a racial quota because there is no evidence that the racial percentages established for J. H. S. 275 are immutable (Brief, pp. 13-14). However, the Court of Appeals in this case held that the issue was whether respondents could adopt a school zone which was intended to and did create a particular set of racial percentages (Petition, Appendix B, p. 4a). That it may exist for one year only does not make it any less a quota. Of course, if respondents' action is upheld they will have the power to adjust the zoning boundary each year to maintain the quota in the face of population shifts.

Respondents also attempt to pass off their action as merely taking "cognizance" of color (Brief, p. 15). However, petitioners demonstrated without contradiction that respondents identified and labelled their children on the basis of their color. Indeed, the pleadings admit this, as Judge Van Voorhis noted (Petition, Appendix B, p. 9a). It is this that petitioners challenge. Had the same treatment been given to children of any other color or race, it would never have been countenanced by any Court. Petitioners believe that the Constitution is truly colorblind, and that they are not to be denied rights granted to others solely because they are white.

CONCLUSION

Whatever may be respondents' justification for their action here, it should have a full briefing and full argument before determination. That the issue cries out for proper determination seems to us obvious, and might well have influenced respondents not to oppose certiorari even though they believe they are right. In opposing by misstating the issue they merely emphasize their concern that their decision was politically expedient but constitutionally erroneous.

This is made crystal clear by the two concluding sentences of respondents' argument defining the rights of petitioners (Brief, p. 16). We do not agree that we have "a constitutional right to attend an integrated school." We contend, rather, that we have a constitutional right which forbids respondents, or any other officials, from assigning our children to a particular school because of the race and color of the children. It is the implementation of that constitutional right which we urge as the basis for the grant of certiorari.

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